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No. 00-1329

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

International Brotherhood of Electrical Workers, Local Union No. 46, *Petitioner,*

v.

Trig Electric Construction Co., a Washington corporation; Lydig Construction, Inc.; Fidelity and Deposit Company of Maryland; and Department of General Administration, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

PETITIONER'S REPLY MEMORANDUM

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1999

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INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Petitioner,

v.

TRIG ELECTRIC CONSTRUCTION CO., A WASHINGTON CORPORATION; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; AND DEPARTMENT OF GENERAL ADMINISTRATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITIONER'S REPLY MEMORANDUM

Respondents' argument concerning the petitioner Union's standing is without merit. In finding that a union had standing to challenge an agency's interpretation of a statute providing benefits to workers who lost jobs because of competition from imports, this Court reiterated its governing principles concerning associational standing in *United Automobile Workers v. Brock*, 477 U.S. 274 (1986):

It has long been settled that "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members." [Citations.] . . . [W]e have found that, under certain circumstances, injury to an organization's members will satisfy Article III and allow that organization to litigate in federal court on their behalf. See *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 40 (1976). In *Warth [v. Seldin,* 422 U.S. 490 (1975)], we set out the nature of these circumstances:

> "The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. . . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Id.,* 422 U.S., at 511.

Subsequently, this doctrine was stated as a three-part test:

> "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the

> claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977).

Brock, 477 U.S. at 281-82.

This Court has found that the first two prongs of this test ensure satisfaction of Article III requirements for injury in fact, causal connection to the defendant's conduct, and redressability. *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 555 (1996). But the third prong is "prudential," i.e., a judicially self-imposed limit on federal jurisdiction that is not constitutionally mandated. "Hence the third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution." *United Food & Commercial Workers, supra,* 517 U.S. at 557. The third prong protects against the risk of "litigating a case to the damages stage only to find the plaintiff lacking detailed records or the evidence necessary to show the harm with sufficient specificity." *Id.* at 556. But ultimately the test is whether the circumstances of the case and the relief requested make individual participation of the association's members indispensable. *Warth,* 422 U.S. at 511.

In this case, the petitioner Union is the duly authorized collective bargaining representative of Trig Electric Construction Co.'s employees, and the Union's complaint so alleges. Complaint for Foreclosure of Labor Lien, ¶ 9. (App., *infra,* 3a) The Union is therefore the associational representative of Trig's employees. *United Food & Commercial Workers, supra,* 517 U.S. at 556 n.6. The first prong of the standing test is satisfied because the Washington public works lien statutes permit workers to file liens for unpaid wages and

benefits and to foreclose on them in their own right. The second prong is also satisfied because recovery of the electrical workers' unpaid benefits is germane to the Union's purpose. And the third prong of the associational standing test — which is not constitutionally mandated — is likewise satisfied: the Union has established the amount of its members' claims, both individually and collectively, through an audit of Trig Electric's payroll records. (R.124-181) Having thus satisfied "these matters of administrative convenience and efficiency" required by the third prong, 517 U.S. at 557, the Union has amply met this Court's standing requirements.

Moreover, this case is factually distinguishable from *Ironworkers District Council v. Board of Regents,* 93 Wn.App. 735, 790 P.2d 351 (1999), cited by respondents. In that case, the union sued only as an "interested party," a term of art under the state prevailing wage statute, and not as a representative of the affected workers. The court found only that the union lacked standing on that basis. In this case, on the other hand, the Union's complaint does not allege "interested party" status, and it specifically sets forth the Union's claims in its capacity "as the exclusive representative of the employees of Trig." Complaint, ¶ 9. (App., *infra,* 3a)

Finally, the Union has standing because its claims derive from a collective bargaining agreement to which it was a party. Complaint, ¶¶ 6 and 7 and Appendix A attached thereto. (App., *infra,* 2a, 3a, 5a-11a). The Union's authority to collect unpaid benefit contributions for the trust funds is conferred by the collective bargaining agreement itself. (App., *infra,* 8a, 9a, 11a). For claims arising under a labor agreement, the Union serves as the legal bargaining agent for individual members. Indeed, under the duty of fair representation arising from its role as bargaining agent, the Union is obliged to enforce its agreements unless justifiable reasons exist for not taking action. Because the Union's claims are grounded on a collective

bargaining agreement, the Union has standing to assert them on behalf of its members.

In view of the foregoing, the Union reiterates its request that the petition be granted.

Respectfully submitted,

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March 30, 2001

APPENDIX A
TO
PETITIONER'S REPLY MEMORANDUM

COMPLAINT FOR FORECLOSURE OF LABOR LIEN AGAINST PUBLIC WORKS CONTRACT PERFORMANCE BOND AND RETAINED PERCENTAGE
King County Superior Court

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 46,
Plaintiff,

v.

TRIG ELECTRIC CONSTRUCTION CO., a Washington Corporation; LYDIG CONSTRUCTION, INC.; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; and DEPARTMENT OF GENERAL ADMINISTRATION,
Defendants.

No. 98-2-26652-0 SEA

Filed November 3, 1998

Plaintiff alleges:

1. Plaintiff International Brotherhood of Electrical Workers, Local Union No. 46 ("Union") is a labor organization operated under the federal labor laws. Plaintiff maintains its offices in Seattle, Washington.

2. Defendant Trig Electrical Construction Co., Inc. ("Trig") is an electrical contractor that performed subcontracting work on the Archives/BCC Building, Bellevue, Washington, Project No. 94-021H.

3. The general contractor for the Archives/BCC Building project is defendant Lydig Construction, Inc.

4. The defendant Fidelity & Deposit Company of Maryland is an insurance company doing business in the State of Washington. Under the laws of the State of Washington (RCW 39.08 et seq.) and under Bond No. CMB08047662 between the surety and Lydig Construction, Inc., the surety has agreed to pay unpaid wages, fringe benefit contributions, liquidated damages and interest to the plaintiff Union on behalf of the employees of its subcontractors who performed work on the Archives/BCC Building project at Bellevue, Washington, Project No. 94-021H.

5. The Department of General Administration contracted with Lydig Construction, Inc. for work on the Archives/BCC Building project. A retainage has been withheld on this project under RCW 60.28.010.

6. At all times material to the claims asserted in this action, defendant Trig and the plaintiff Union were parties to a collective bargaining agreement which, in material part, contains the provisions set forth in Exhibit A to this complaint.

7. The plaintiff Union believes and therefore alleges that Trig has employed employees who are covered by the labor agreement, but has failed and refused to pay wages and to make the required monthly fringe benefit contributions for such employees who performed labor on the aforementioned project, timely. Trig owes $45,142.07 in unpaid contributions, $8,572.30 in liquidated damages and $3,762.00 in interest (calculated through October 31, 1998) plus costs and attorneys' fees for the months of December 1997 and January 1998.

8. The Notice of Claim was filed on March 25, 1998 with the Department of General Administration, and a copy is attached as Exhibit B. A First Amended Notice of Claim was filed on July 22, 1998, and a copy is also attached as Exhibit C. This action to foreclose on the aforementioned claim is commenced more than thirty days but less than four months from the date of such filing under the laws of the State of Washington.

9. In accordance with the provisions of RCW 39.12.050(1) and RCW 30.08.010, et seq., the Union, as the exclusive representative of the employees of Trig, is entitled to recovery of the claims set forth above, in addition to costs and expenses of suit, from the proceeds of the payment and performance bond No. CMB08047662 issued by Fidelity & Deposit Company of Maryland to Lydig Construction, Inc. for the Archives/BCC Building project at Bellevue, Washington, Project No. 94-021H.

10. In accordance with the provisions of RCW 39.12.050(1) and RCW 60.28.010, et seq., the Union is entitled to recovery of the claims set forth above in addition to costs and expenses of suit from the retained percentage withheld from Lydig Construction, Inc. by the Department of General Administration.

WHEREFORE, the Union prays for a money judgment as follows:

(a) Judgment against the surety, Fidelity & Deposit Company of Maryland, for the full amount of contributions, liquidated damages, interest, reasonable attorneys' fees and costs and expenses of suit found to be owing to the plaintiff Union to the date of judgment herein;

(b) Judgment against the Department of General Administration and an order foreclosing lien of the claims herein against the retained percentage withheld from Lydig Construction, Inc. for the full amount of contributions, liquidated damages, interest, reasonable attorneys' fees and costs and expenses of suit to be owing to the plaintiff Union No. 46 to the date of judgment herein; and

(c) For such other and further relief as the court deems just and equitable.

DATED this 27th day of October, 1998.

/s/

Michael H. Korpi, WSBA #12711
DONALDSON, KIEL & McKENZIE, P.S.
Attorneys for Plaintiff

IBEW LOCAL UNION NO. 46

COLLECTIVE BARGAINING AGREEMENT*

Effective July 1, 1991 Through May 31, 1994 (Extended to May 31, 1998)

APPRENTICESHIP AND TRAINING

* * *

Section 3.19 The parties to this agreement shall be bound by the Joint Apprenticeship and Training Trust Fund Agreement which shall conform to Section 302 of the Labor Management Relations Act of 1947, as amended, ERISA and other applicable regulations.

The Trustees authorized under this Trust Agreement are hereby authorized to determine the reasonable value of any facilities, materials, or services furnished by either party. All funds shall be handled and disbursed in accordance with the Trust Agreement.

Section 3.20 All Employers subject to the terms of this agreement shall contribute twelve (12) cents for each hour (increased to seventeen (17) per hour November 28, 1994, twenty (20) cents per hour November 27, 1995, and twenty three (23) cents per hour June 1, 1996) worked by all Journeymen and indentured Apprentices. This sum shall be due the trust fund by the same date as is their payment to the NEBF under the terms of the employees benefit agreement.

*Exhibit A to Complaint

ARTICLE IV
FRINGE BENEFITS

Section 4.02 (a) **National Electric Benefit Fund.** It is agreed that in accord with the National Employees Benefit Agreement of the National Electrical Benefit Fund (NEBF), as entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1994, as amended, and now delineated as the restated Employees Benefit Agreement and Trust, that unless authorized otherwise by the NEBF the individual employer will forward monthly to the NEBF's designated Local Collection Agent an amount equal to three percent (3%) of gross monthly labor payroll paid to, or accrued by the employee in this bargaining unit and a complete payroll report prescribed by the NEBF. The payment shall be made by check or draft and shall constitute a debt due and owing to the NEBF on the last day of each calendar month, which may be recovered by suit initiated by the NEBF or its assignee. The payment and the payroll report shall be mailed to reach the office of the appropriate local collection agent not later than fifteen (15) days following the end of each calendar month.

The individual employer hereby accepts, and agrees to be bound by, the restated Employees Benefit Agreement and Trust. An individual employer who fails to remit as provided above shall be additionally subject to having this agreement terminated upon seventy-two (72) hours notice in writing upon being served by the Union, provided the individual Employer fails to show satisfactory proof the required payment has been paid to appropriate local collection agent.

The failure of an individual employer to comply with the applicable provision of the Restated Employees Benefit Agreement and Trust shall also constitute a breach of their Labor Agreement.

Section 4.03 (a) **Health and Welfare**. Effective July 1, 1991 each Employer party to this agreement agrees to contribute on July 1, 1991 $1.435, on 12/1/91 $1.585, on 6/1/92 $ 1.735, on 12/1/92 $1.885, on 6/1/93 $2.035, on 12/1/93 $2.585, on 11/28/94 $2,636, on 11/27/95 $2.705, on 6/1/96 $2.805, and on 6/1/97 $2.88 for each hour worked by each employee performing work covered by this agreement to the Local Union No. 46 , IBEW Health and Welfare Trust Fund, a jointly trusted welfare trust created pursuant to Section 302(c) of the Labor-Management relations Act of 1974 (Taft-Hartley). The one-half (1/2) cents per hour increase shall be used to pay for FICA claims against Employers.

(b) Payment shall be due on the fifteenth of the month following the month in which the hours were worked. Each remittance shall be accompanied by a form which will be made available for this purpose.

(c) Each Employer party to this agreement agrees to be bound by the terms and provisions of the Trust Agreement governing the Local Union No. 46, I.B.E.W. Health and Welfare Trust Fund, effective January 1, 1976, and all amendments or revisions hereafter adopted, and further agrees to accept as its representatives the current Employer Trustees and their lawfully appointed successors.

(d) In addition to the remedies provided in the aforementioned Trust Agreement in the event of delinquency in the payment of contributions required by this agreement, employers who fail to remit regularly shall be subject to having this agreement terminated upon seventy-two (72) hours notice in writing, being served on the employer by the Union, provided the Employer fails to show proof that the delinquent payments have been paid to the Trustees of the Puget Sound Electrical Workers Health and Welfare Trust Fund.

(e) When an Employer is delinquent in filing the contribution report or paying promptly the Health and Welfare contribution required, it is agreed that the Union shall take such action as appears to the Union to be appropriate to effect collection, including the removal of employees covered under the Collective Bargaining Agreement.

(f) The failure of an Employer to comply with the applicable provisions of the Trust Agreement governing the Puget Sound Electrical Workers Health and Welfare Trust Fund shall also constitute a breach of this labor agreement.

(g) In no event, however shall the Trustees be obligated to pursue the collection of delinquent contributions through the grievance-arbitration procedures provided in this labor agreement.

Section 4.04 (a) **Local Union Pension**

(1) Each Employer party to this agreement agrees to contribute the following amounts for each hour worked by each employee performing work covered by this agreement. Except as provided for Apprentices, to the Puget Sound Electrical Workers Pension Trust, a jointly trusted pension trust created pursuant to Section 302(c) of the Labor-Management Relations Act of 1947 (Taft-Hartly). Effective July 1, 1991 the contribution shall be two dollars and thirty cents($2.30). Effective 6/1/92 the contribution shall be two dollars and forty cents($2.40), effective 12/1/92 the contribution rate shall be two dollars and fifty-six cents ($2.56), effective 6/1/93 the contribution rate shall be two dollars and seventy-three cents ($2.73), effective 6/1/96 the contribution rate shall be three dollars and twenty four cents ($3.24), and effective 6/1/97 the contribution rate shall be three dollars and thirty-four cents ($3.34) and the pension shall be $3.34 until the end of this Agreement.

(2) Effective 7/1/91, an Annuity plan will be established with a contribution rate of $0.35 per hour for a defined contribution plan. Effective 5/3/94 $0.55, effective 11/28/94 $0.60, effective 5/29/95 $0.70, effective 11/27/95 $0.75 and effective 6/1/96 $0.80.

* * *

(b) Payment shall be due on the fifteenth (15th) of the month following the month in which the hours were worked. Each remittance shall be accompanied by a form which will be made available for this purpose.

(c) Each Employer party to this Agreement agrees to be bound by the terms and provisions of the Trust Agreement governing the Puget Sound Electrical Workers Pension Trust effective June 1, 1973 and all amendments or revisions hereafter adopted and further agrees as its representatives the current Employer Trustees and their lawfully appointed successors.

(d) In addition to the remedies provided in the aforementioned Trust Agreement in the event of delinquency in the payment of contributions required by this agreement, Employers who fail to remit regularly shall be subject to having this agreement terminated upon seventy-two(72) hours notice in writing, being served on the Employer by the Union, provided the Employer fails to show proof that the delinquent payments have been paid to the Trustees of the Puget Sound Electrical Workers Pension Trust.

(e) When an Employer is delinquent in filing the contribution report or paying promptly the pension contribution required, it is agreed that the Union shall take such action as appears to the Union to be appropriate to effect collection, including removal of employees covered under the Collective Bargaining Agreement.

(f) The failure of an Employer to comply with the applicable provisions of the Trust Agreement governing the Puget Sound Electrical Workers Pension Trust shall also constitute a breach of this labor agreement.

(g) In no event, however, shall the Trustees be obligated to pursue the collection of delinquent contributions throughout the grievance-arbitration procedure provided in this labor agreement.

Section 4.05 Vacation and Allowance Plan. All Employers subject to this collective bargaining agreement shall withhold from the pay of each employee, as a vacation allowance, an amount equal to six percent (6%) of the hourly rate of pay (as set forth in Section 3.08 (a) nearest the one cent ($.01) for each compensable hour worked under the terms and conditions of this collective bargaining agreement. On all overtime work the vacation allowance be withheld on the straight time hourly rate only. The Vacation Allowance Plan shall be administered by the Trustees of the Puget Sound Electrical Workers Health and Welfare Fund.

Each Employer party to this agreement agrees to be bound by the terms and provisions of the Trust Agreement governing the Local Union No. 46, IBEW Health and Welfare Trust Fund, effective January 1, 1976, and all amendments or revisions hereafter adopted, and further agrees to accept as its representatives the current employer Trustees and the lawfully appointed successors.

(a) Vacation allowance shall be paid to all employees who are directed by the individual Employer to work on jobs outside of the jurisdiction on Local Union No. 46, IBEW.

(b) Should an Employer direct an employee to work in the jurisdiction of another Local Union having an established vacation allowance plan in its collective bargaining agreement

they shall not be required to contribute the vacation allowance, since the Employer will be required to contribute to a vacation allowance in accordance with that particular Local Union's vacation allowance. If it is less than the Local Union No. 46 agreement, the Employer shall pay the difference to Local Union No. 46, Vacation Plan, for said employee's account.

(c) This vacation allowance shall be withheld from the employee's weekly pay and shall be sent on a monthly transmittal to the designated depositor.

* * *

(n) Employers who fail to remit regularly shall be subject to having this agreement terminated upon seventy-two (72) hours notice in writing being served on the Employer by the Union, provided the Employer fails to show proof that the delinquent payments have been paid. When an Employer is delinquent in filing the vacation report or paying promptly the vacation allowance required, it is agreed that the Union shall take such action as appears to the Union to be appropriate to effect collection.

(o) The failure of an individual Employer to comply with the applicable provisions of the Vacation Allowance Plan shall also constitute a breach of this labor agreement.